Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 22, 24, 27, 74, 80, 90,	)	
95, and 101 To Establish Uniform License	)	
Renewal, Discontinuance of Operation, and	)	WT Docket No. 10-112
Geographic Partitioning and Spectrum	)	
Disaggregation Rules and Policies for Certain	)	
Wireless Radio Services	)	
	)	
Imposition of a Freeze on the Filing of	)	
Competing Renewal Applications for Certain	)	
Wireless Radio Services and the Processing of	)	
Already-Filed Competing Renewal	)	
Applications	)	

To: The Commission

OPPOSITION OF WCS COALITION
TO PETITION FOR RECONSIDERATION

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SUMMARY

The Commission's decisions to grant pending renewal applications subject to the results of the pending notice and comment rulemaking proposing to replace the current one-step renewal process for most Wireless Radio Services with a uniform two-step process, to dismiss pending competing applications should the Commission adopt the proposed two-step renewal system, and to hold competing WCS applications in abeyance until the conclusion of the notice and comment rulemaking are well within the Commission's authority and not arbitrary and capricious. As such, the petition for reconsideration filed by Green Flag Wireless, LLC, *et al*. ("Petitioners") should be denied.

Contrary to Petitioners' assertion, the Commission has authority to alter its renewal rules and dismiss currently-pending competing applications. While Petitioners are correct in noting that Congress has mandated the use of two-step processes for broadcast renewals, there is nothing in the record to suggest that Congress intended to preclude the Commission from exercising its broad authority to apply two-step renewal processes to non-broadcast service.

If the Commission does adopt the two-step renewal proposal advanced in the *NPRM*, it can dismiss the pending competing applications without prejudice to the ability of a competing applicant to re-apply should renewal be denied. Petitioners concede that the Commission can dismiss pending applications when rules are modified following the submission of the applications, but suggest that where mutually-exclusive applications are on file, the Commission may not dismiss only some. However, the D.C. Circuit decision in *HITN v. FCC* establishes that Petitioners are wrong – the Commission is free to modify its rules so that some mutually-exclusive applications are no longer eligible and, where it does, the Commission can dismiss the ineligible applications while preserving those unaffected by the rule change.

There is no basis for Petitioners' assertion that the Commission is precluded from conditionally granting renewal applications subject to a final determination on moving to a two-step renewal system. *Ashbacker* and it progeny are not implicated by the *Order* at issue here because the Commission was careful to order that renewals be conditionally renewed, subject to the outcome of the pending notice and comment rulemaking. If the Commission decides to preserve the current one-step application system applicable to Part 27, any WCS licenses granted as a result of the *Order* can be re-opened for comparative hearings.

Finally, the Commission has authority to grant all of the pending 2.3 GHz WCS renewal applications where it finds that doing so is in the public interest. Neither the Communications Act nor the case law mandates that, given the very unique circumstances surrounding the 2.3 GHz band and the challenges licensees have faced in deploying service, the Commission nonetheless only renew licenses for which a substantial service showing was made by July 21, 2007. The Commission expressly found in 2006 that it was in the public interest to defer the WCS substantial service deadline until 2010, and the Commission cannot now penalize those WCS licensees that relied on that extension by denying renewal.

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To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

The WCS Coalition,[1] by its attorneys, hereby opposes the petition for reconsideration[2] filed by Green Flag Wireless, LLC, CWC License Holding, Inc., James McCotter and NTCH-CA, Inc. (the "Petitioners") seeking reversal of certain aspects of the Commission's May 25, 2010 *Order* in

[1] The WCS Coalition represents the interests of 2.3 GHz band Wireless Communications Service ("WCS") licensees before the Commission. Members of the WCS Coalition have pending before the Commission numerous applications for renewal of WCS licenses that were submitted in mid-2007, and thus the WCS Coalition has a vested interest in the adoption of Commission rules and policies governing the processing of those applications.

[2] *See* Petition for Reconsideration of Green Flag Wireless, LLC, CWC License Holding, Inc., James McCotter and NTCH-CA, Inc., WT Docket No. 10-112 (filed Aug. 6, 2010) ("Petition"). The Wireless Telecommunications Bureau has extended the time afforded for responding to the Petition until August 23, 2010. *See* Wireless Telecommunications Bureau Extends Time To File Oppositions To Petitions For Reconsideration Of Freeze Order, *Public Notice*, DA 10-1537 (rel. Aug. 13, 2010).

the above-referenced proceeding.[3] The Petition should be denied, as the *Order* is a lawful and reasonable exercise of the Commission's authority to establish interim procedures to govern contested WCS renewals during the period between the issuance of the *Notice of Proposed Rulemaking* ("*NPRM*") in this proceeding and a final determination of the issues raised therein.

Among other things, the *NPRM* has proposed adoption of a new regime to govern the more than 145 WCS renewal applications that have been pending for over three years. The Commission has recognized that by allowing the filing of competing applications when a renewal application is submitted, the present rules can result in "protracted litigation that may be unduly burdensome for an incumbent licensee and strain available Commission resources,"[4] may misallocate "resources that might otherwise be used to improve service to the public,"[5] pose a risk of "'strike' applications against a renewal applicant for possible anticompetitive purposes, to harass an applicant, or to exact a payoff,"[6] and fail to result in the award of a non-renewed license to the entity that values it the most.[7] Thus, the *NPRM* proposes to adopt for WCS (and most other Wireless Radio Services) a two-step license renewal system to eliminate the filing of competing applications and comparative hearings in those services, and to provide for the use of competitive bidding or other licensing mechanisms should a license not be renewed.[8]

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[3] Amendment of Parts 1, 22, 24, 27, 74, 80, 90, 95, and 101 To Establish Uniform License Renewal, Discontinuance of Operation, and Geographic Partitioning and Spectrum Disaggregation Rules and Policies for Certain Wireless Radio Services, *Notice of Proposed Rulemaking and Order*, 25 FCC Rcd 6996 (2010) ("*NPRM and Order*" or "*Order*").

[4] *NPRM and Order*, 25 FCC Rcd at 7012.

[5] *Id.*

[6] *Id.* at 7013 (citation omitted).

[7] *See id*.

[8] *See id.* at 7013-14.

Petitioners object to the Commission's treatment of their pending competing applications and the mutually exclusive renewal applications they are competing against.[9] The Commission has concluded that, should it adopt the two-step renewal process proposed in the *NPRM*, it will dismiss all pending competing exclusive applications and move immediately to whatever new regime governing license renewals is adopted.[10] For now, however, the Commission will "hold these already-filed competing applications in abeyance until the conclusion of this proceeding,"[11] because the Commission recognizes that it "may not adopt the proposed rules and policies" and "must preserve any available legal rights of the applicants that have already filed competing renewal

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[9] Petitioners have inaccurately asserted that "[a]ll of [their] applications were predicated on the absence of substantial service by the incumbent licensee . . . ." Petition at 2. The point is irrelevant because, as discussed below, the Commission is well within its authority to renew a license in the absence of substantial service. However, a review of Appendix C to the *NPRM and Order* reveals various instances in which one of Petitioners filed a competing application notwithstanding the fact that the incumbent licensee was providing substantial service at the time. Stratos Offshore Services Company submitted its substantial service showings for KNLB212, KNLB319, KNLB320, and KNLB321 on June 18, 2007 – more than a month before Green Flag Wireless, LLC submitted competing applications. *Compare* File Nos. 0003099720, 0003099839, 0003099830, 0003099839 (Stratos substantial service showings) *with* File Nos. 0003119925-0003119928. Thus, Petitioners' assertion that they did not file competing applications where substantial service had been shown is patently untrue.

Although the issue is not of particular concern to the WCS Coalition since WCS renewal applications have already been filed, the assertion by Petitioners that "[t]he freezing of competing applications also serves to immunize newly filed renewal applications from challenge" (Petition at 2) overlooks that the Commission is permitting the filing of petitions to deny renewal applications. *See NPRM and Order*, 25 FCC Rcd at 7039. In *Kessler v. FCC*, a case on which Petitioners rely (*see* Petition at 17-18), the D.C. Circuit specifically found that an interim freeze on new applications while the Commission considered substantive rule changes did not violate the Section 309(e) right to a hearing. 326 F.2d 673, 684 (1963).

[10] *See NPRM and Order*, 25 FCC Rcd at 7033-34.

[11] *Id.* at 7033.

applications, as well as the legal rights of any party that might be interested in filing a competing renewal application absent the subject freeze."[12]

At the same time, the Commission has recognized the uncertainty created when, as here, renewal applications are pending for an inordinate length of time. Thus, the Commission has directed the Wireless Telecommunications Bureau to grant currently pending applications for renewal, as well as applications for renewal filed during this rulemaking, except for those subject to petitions to deny that raise appropriate issues and cannot be readily resolved.[13] Once again, however, the Commission has been cognizant of the interests of applicants, and has ordered that any such renewal grants be made on a conditional basis, "subject to the outcome of this proceeding."[14] As a result, should the Commission ultimately elect to retain the current one-step renewal system at the conclusion of the notice and comment phase of this proceeding, renewals conditionally granted pursuant to the *Order* can be re-opened for comparative hearings.[15]

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[12] *Id.* at 7034.

[13] *See id.* at 7039. To the extent that Petitioners are asserting that "Section 309(e) of the Communications Act requires the Commission to hold a hearing when it is unable to make the finding required by Subsection (a) of 309 that the grant of a particular application is in the public interest," (Petition at 2), they will receive no quarrel from the WCS Coalition. Thus, for example, if the Commission were unable to determine that a pending renewal application can be granted consistent with the public interest, a hearing on the issue would be required. However, Section 309(a) merely requires a hearing limited to the issue of whether grant of the renewal application will be in the public interest, and, for the reasons discussed below, does not mandate that the hearing also include an evaluation of competing applications.

[14] *NPRM and Order*, 25 FCC Rcd at 7039.

[15] In addition to holding in abeyance pending competing applications, the *Order* directed that all pleadings and correspondence regarding those applications and their entitlement to comparative consideration also be held in abeyance. *See id.* at 7034. WCS licensees have demonstrated in filings that are now being held in abeyance that Petitioners' competing applications are not entitled to participate in a comparative hearing because the Commission cannot find that their participation would be in the public interest, as required by Section 27.321(b) of the Commission's Rules. *See* Letter from James J.R. Talbot, Senior Attorney, AT&T Services, Inc., to Marlene Dortch, Secretary,

(continued on next page)

Contrary to the arguments advanced by Petitioners, the Commission's proposed new rules are well within its lawful authority. The Commission may adopt a two-step licensing process under which Wireless Radio Service renewal applications are evaluated on their own merits, and only when a renewal application is denied will third-party applications for the non-renewed license be entertained.[16] And, should the Commission adopt such a two-step system for evaluating renewal applications in the Wireless Radio Services, it lawfully may apply that system to pending applications. As such, the *Order*'s interim approach of conditionally granting contested WCS renewal applications while holding competing applications in abeyance during the pendency of this proceeding is a permissible exercise of the Commission's broad authority over the licensing of radio facilities.

FCC, FCC File no. 0003062647 *et al*. (filed Sept. 28, 2007); Letter from James J.R. Talbot, Senior Attorney, AT&T Services, Inc., to Marlene Dortch, Secretary, FCC, FCC File no. 0003062647 *et al*. (filed Sept. 18, 2007), *citing* 47 C.F.R. § 27.321(b) ("An application will be entitled to comparative consideration with one or more conflicting applications only if the Commission determines that such comparative consideration will serve the public interest."). As is discussed in Section II below, the Commission effectively concluded that the public interest would not be served by subjecting current WCS licensees to comparative hearings when it granted requests for extending the deadline for compliance with the WCS "substantial service" requirement until July 21, 2010.

[16] *See id.* A fundamental flaw in the Petition stems from Petitioners' assertion that under the Part 27 renewal process applicable to WCS, once Petitioners submitted competing applications that were mutually exclusive with pending renewal applications, "a comparative renewal proceeding is to take place . . . ." Petition at 3. In fact, as the Commission recognizes in the *NPRM and Order*, "Part 27, however, does not specify what type of hearing procedures (two-step or otherwise) would apply to mutually exclusive applications in the WCS renewal context." *NPRM and Order*, 25 FCC Rcd at 7000. Indeed, Petitioners' own filing in response to the *NPRM* establishes that the Commission's process for handing WCS competing applications is ill-formed, and thus Petitioners can hardly claim to have had any reasonable expectations regarding the manner in which their applications would be handled. Comments of Green Flag Wireless, LLC, *et al*., WT Docket No. 10-112, at 4-11 (filed Aug. 6, 2010) (acknowledging. among other things, that there is no cut-off rule to govern Part 27 comparative renewals, that the rules do not establish a process for the public to petition to deny renewal applications, that there is no standard to govern whether an incumbent is entitled to renewal, and that there are no standards in place for an administrative law judge to apply in determining the victor of a comparative hearing) ("Green Flag *NPRM* Comments").

I. THE COMMISSION HAS AUTHORITY TO ALTER ITS RENEWAL RULES AND DISMISS CURRENTLY-PENDING COMPETING APPLICATIONS.

A fundamental predicate to Petitioners' attack on the *Order* is that, at the conclusion of the Commission's notice and comment process, the Commission cannot lawfully adopt the proposals in the *NPRM* to implement a two-step renewal system for the Wireless Radio Services, to utilize competitive bidding or other mechanisms in lieu of comparative hearings to award licenses that are not renewed, and to dismiss pending competing applications so the new system can be implemented immediately.[17] Petitioners are wrong – the Commission has ample authority to adopt a two-step renewal system for the Wireless Radio Services and, upon doing so, to implement its new approach by dismissing all pending competing applications filed under the current one-step system.

A. The Congressional Mandate That Two-Step Processes Apply To Broadcast Renewals Does Not Preclude The Commission From Exercising Its Broad Authority To Apply Two-Step Renewal Processes To Non-Broadcast Services.

Petitioners contend that "[t]he Commission is . . . usurping unlawfully the legislative power of Congress" by adopting a two-step renewal process for Wireless Radio Services based on the similar one that Congress has mandated for use in the broadcast services.[18] Apparently, Petitioners believe that because Congress *mandated* the use of a two-step renewal process solely for broadcast services when in 1996 it adopted Section 309(k) of the Communications Act of 1934, as amended (the "Communications Act"), the Commission is precluded from exercising its existing discretion to

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[17] *See* Petition at 4-8.

[18] *See id*. at 13. *See also* Green Flag *NPRM* Comments at 1-2 (The Communications Act of 1934 "does [not] permit the Commission to adopt the two-step renewal process now in place for broadcast licensees since that process was only permitted by an amendment of the Communications Act limited to broadcast licensees only.").

apply the same approach to other services absent specific Congressional authority.[19] The law, however, does not support Petitioners' assertion.

The Communications Act provides the Commission with broad authority over the issuance of radio licenses.[20] As the Supreme Court found in *FCC v. Pottsville Broadcasting Co.*, while the "public convenience, interest, or necessity" is the Congressional touchstone for the exercise of the Commission's authority, "the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked – the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions – were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements

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[19] It should be noted that many of the cases cited by Petitioners in support of their claim that the Commission must retain the current system for processing renewal applications were decided in connection with broadcast applications predating the adoption of Section 309(k). *See, e.g.* Petition at 5. As is discussed in greater detail below, those decisions were made where the Commission's rules at the time mandated a one-step comparative renewal processes, and did not yet call for two-step renewals. This is a significant distinction – the cases relied on by Petitioners thus cannot be fairly cited for the proposition that the Commission is barred from adopting a two-step licensing process. Rather, they merely provide that when the Commission has a one-step comparative renewal process in place, that process must be employed unless and until it is changed (as the *NPRM* proposes to do here).

[20] *See, e.g.*, Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614, 9709 (2002) ("The Commission has broad discretion to establish licensing rules in the public interest.") (citation omitted); *Southeast Fla. Broad. Ltd. P'ship v. FCC*, 1991 U.S. App. LEXIS 26581, *7 (D.C. Cir. 1991) ("The FCC has discretion to create its own standards for renewal expectancy as long as it engages in reasoned decisionmaking."); *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 411-12 (D.C. Cir. 1983) ("[T]he FCC is entitled to reconsider and revise its views as the public interest and the means needed to protect that interest, though it must give a sufficient explanation of that change. The language of the Act imposes few specific requirements and the FCC is generally given broad discretion . . . .") (citation omitted).

designed for the protection of private as well as public interest."[21] It is also well settled that the Commission need not be wedded to a particular licensing solution if it determines that the public interest would be better served by different approach. As noted by the D.C. Circuit, "[t]he Commission 'is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest,' if it gives a reasoned explanation for the revision."[22]

Petitioners' argument that the adoption of Section 309(k) mandating a two-step process for broadcast stations precludes adoption of similar approaches for other services is simply wrong. A proper interpretation of Section 309(k) must begin with the plain text of the statute, as required under the *Chevron* doctrine.[23] The plain language of Section 309(k) provides no support for Petitioners' argument – nothing in the statutory language limits or even addresses the Commission's authority to adopt a two-step renewal process for Wireless Radio Services or other non-broadcast services. Indeed, the title of Section 309(k), "Broadcast Station Renewal Procedures," belies any suggestion that the statute has any relevance whatsoever to any non-broadcast service. Hence, it appears that Petitioners are looking beyond the plain text of Section 309(k) and, relying on the doctrine of *expressio unius est exclusio alterius* ("*expressio unius*"), are asking the Commission to believe that Congress's reference to "broadcast" in the statute forecloses the Commission from adopting a two-step licensing model for non-broadcast services.

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[21] *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 137-38 (1940).

[22] *DIRECTV, Inc. v. FCC*, 110 F.3d 816, 826 (D.C. Cir. 1997), quoting *Black Citizens*, 719 F.2d at 411.

[23] *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (when reviewing an agency's interpretation of a federal statute, a court must first examine whether Congress has "directly spoken to the precise question at issue").

Petitioners overlook that the Commission has taken a far narrower view of the *expressio unius* doctrine. Indeed, the Commission has observed that *expressio unius*:

> is non-binding and "is often misused." The maxim's force in particular situations depends entirely on context, whether or not the draftsmen's mention of one thing, like a grant of authority, does really necessarily, or at least reasonably, imply the preclusion of alternatives."[24]

The United States Supreme Court has put it more bluntly: "We do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it."[25]

No such supposition is plausible here. Nowhere in the Congressional reports associated with the Telecommunications Act of 1996 Act are radio services other than broadcast discussed in relation to Section 309(k).[26] Certainly, there is nothing to suggest that Congress intended to foreclose the Commission from adopting two-step renewal processing for other services under the Commission's existing broad authority, should the Commission conclude that such processing advanced the public interest. Appellate courts have refused to apply the *expressio unius* doctrine where, as here, the underlying record offers no basis for doing so and application of the doctrine

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[24] Telephone Number Requirements for IP-Enabled Services Providers, *Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking*, 22 FCC Rcd 19531, 19547 (2007) (citations omitted).

[25] *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). *See also United States v. Vonn*, 535 U.S. 55, 65 (2002) ("At best, as we have said before, the canon that expressing one item of a commonly associated group or series excludes another left unmentioned is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives.").

[26] S. Rep. No. 104-230, at 164-65. (1996) (Conf. Rep.) S. Rep. No. 104-23, at 42 (1995); H. Rep. No. 104-204, at 123 (1995). Further, statements on the Congressional floor suggest that this provision of the Telecommunications Act of 1996 was directed solely at redressing impacting broadcast services. *See* 142 Cong. Rec. S. 687 (Feb. 1, 1996) (statement of Sen. Burns, "[the legislation] also reforms the broadcast license renewal process to forestall strike units or other abusive practices by self-styled consumer groups and community activists . . . .").

would prevent the Commission from fulfilling its primary directives under the Communications Act.[27] The Commission thus should reject Petitioners' *expressio unius* argument out of hand.[28]

Moreover, Petitioners' argument ignores that years before Section 309(k) was adopted, the Commission had already adopted a two-step licensing process for the Part 22 Cellular Radio Service.[29] If Petitioners' interpretation of Section 309(k) were correct and Congress intended to limited two-step renewal processing to only broadcast services, presumably Congress would have

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[27] *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 444-45 (5th Cir. 1999).

[28] Moreover, this is not a situation where a presumption in favor of *expressio unius* might apply, *i.e.*, where Congress has included particular language in one section of a statute and omitted it in another section of the same statute. *See Russello v. United States*, 464 U.S. 16, 23 (1982); *Field v. Mans*, 516 U.S. 59, 75-76 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects."). In such a "compare and contrast" scenario, "the maxim's interpretative value is at its apex because the underlying inference of legislative intent is most plausible." *United States v. Councilman*, 418 F.3d 67, 74 (1st Cir. 2005). Conversely, Petitioners are relying exclusively on Congress's reference to broadcast but not other services within Section 309(k) itself. As noted *supra*, that omission is easily explained by the fact that Section 309(k) is exclusively a broadcast statute that has no connection at all to non-broadcast services.

[29] *See* Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service, *Memorandum Opinion and Order on Reconsideration*, 8 FCC Rcd 2834, 2841 (1993) ("*CRS MO&O*"). *See also NPRM and Order*, 25 FCC Rcd 6999-7000. It should be noted that in deciding to utilize a two-step process for Part 22 licensees, the Commission expressly rejected the proposition that the D.C. Circuit's decision in *Citizens Commc'ns Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972), precluded the adoption of a two-step renewal system. The Commission concluded that the *Citizens* decision was inapplicable to non-broadcast renewal proceedings, and that, even were it applicable, the decision no longer reflects current jurisprudence regarding the Commission's authority over radio licensing. *See CRS MO&O*, 8 FCC Rcd at 2838-39. Among the cases cited by the Commission in support of its two-step approach was *Hispanic Infor. & Telecomms. Network, Inc. v. FCC*, 865 F.2d 1289, 1294 (D.C. Cir. 1989) ("*HITN v. FCC*"), where, as discussed below, the D.C. Circuit affirmed the Commission's decision to dismiss one of two mutually exclusive applications after the Commission modified its rules to make the dismissed applicant ineligible for a grant.

mandated that the Commission modify its Part 22 renewal policy.[30] Congress, of course, did not do so then, and it has not done so in the fourteen years since it adopted Section 309(k). Under these circumstances, Petitioners stretch credulity in suggesting that Congress only intends for two-step processing to be used in the broadcast services. While Congress has given the Commission no discretion when it comes to the broadcast services, there is nothing to suggest that Congress intended to foreclose the Commission from exercising its broad discretion and adopting two-step processing for other services.

The WCS Coalition appreciates that Petitioners have advanced arguments to the effect that it would be unwise for the Commission to modify its Wireless Radio Service renewal processes by adopting a two-step system and eliminating competing applications.[31] Those arguments will be considered by the Commission as it evaluates the issues raised by the *NPRM*, and may or may not lead the Commission to adopt the *NPRM*'s proposals. Certainly, the record developed to date in response to the *NPRM* overwhelmingly establishes that it would not be arbitrary and capricious for the Commission to adopt the two-step licensing approach proposed by the *NPRM*.[32] However, that

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[30] Of course, were the Commission to agree with Petitioners, it would not only have to modify the Part 22 renewal process, but also revisit the 700 MHz two-step renewal system it recently implemented. *See* Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8064, 8092-94 (2007).

[31] *See* Petition at 14-15. Those arguments have been incorporated by reference in Petitioners' comments regarding the *NPRM*. *See* Green Flag *NPRM* Comments at 1-2. It should be noted that while the "Petitioners firmly believe that they can and will provide better service to the public than the incumbents," (Petition at 2), the Commission specifically recognized that a two-step license renewal process has the benefit of "avoiding the risk of replacing an acceptable service provider with an inferior one, based on unproven promises." *CRS MO&O*, 8 FCC Rcd at 2837.

[32] *See, e.g.* Comments of AT&T Inc., WT Docket No. 10-112, at 29-31 (filed Aug. 6, 2010); Comments of CTIA – The Wireless Ass'n, WT Docket No. 10-112, at 28-30 (filed Aug. 6, 2010); Comments of LightSquared Inc., WT Docket No. 10-112, at 6-7 (filed Aug. 6, 2010); MetroPCS Communications, Inc., WT Docket No. 10-112, at 5-8 (filed Aug. 6, 2010); Comments of Sprint Nextel Corporation, WT Docket No. 10-112, at 14-16 (filed Aug. 6, 2010); Comments of T-Mobile

(continued on next page)

need not be decided in the context of ruling on the Petition. For purposes of evaluation the Petition's attack on the *Order*, the important point is that the Commission has authority under the Communications Act to adopt a two-step renewal system for the Wireless Radio Services so long as it does so in a manner that is not arbitrary and capricious.

USA, Inc., WT Docket No. 10-112, at 2-3 (filed Aug. 6, 2010); Comments of Verizon Wireless, WT Docket No. 10-112, at 14-15 (filed Aug. 6, 2010); Comments of WCS Coalition, WT Docket No. 10-112, at 1-5 (filed Aug. 6, 2010); Comments of Wireless Communications Ass'n Int'l, Inc., WT Docket No. 10-112, at 1-2 (filed Aug. 6, 2010).

Certain of the arguments advanced by Petitioners against the two-step system are patently flawed. For example, Petitioners allege that the conditional grant policy, coupled with a freeze on competing applications, will "cast a thick pall over the secondary market for wireless licensees." Petition at 6-7. However, where there are competing renewal applications, it is certainly clear that conditional renewals are better policy than the alternative suggested by Petitioners – leaving the mid-2007 WCS renewal applications pending even longer. In the *Order*, the Commission correctly determined that conditional licenses would "mitigate" some of the uncertainty that a "long-standing 'pending' renewal application can create." *NPRM and Order*, 25 FCC Rcd at 7039. The Commission reasonably concluded that conditional renewals are preferable to Petitioners' alternative of holding renewal applications in abeyance. Moreover, there is no basis for Petitioners' assertion that the Wireless Telecommunications Bureau is somehow precluded from allowing the assignment or transfer of conditionally granted renewals. *See* Petition at 6-7. To the contrary, the only logical conclusion from the *Order* is that the Commission intends to normalize the secondary market to the maximum extent possible during the pendency of the *NPRM*, and that would include allowing the processing of assignment and transfer applications in the normal course.

Petitioners are also wrong in suggesting that the Commission's resources would not be strained by retention of the current license renewal system. *Id*. at 4. While it is true that the Commission's sole Administrative Law Judge ("ALJ") does not currently have a substantial docket, there are approximately 430,000 renewal showings due before the Commission over the course of the next ten years. *NPRM and Order*, 25 FCC Rcd at 6999. If even one half of one percent of these results in competitive applications, the ALJ would be confronted with over two thousand cases. Moreover, Commission resources more broadly could be strained either through direct participation or assistance in the hearing process. *See* 47 C.F.R. § 0.111 (Enforcement Bureau duties include "[s]erv[ing] as trial staff in formal hearings conducted pursuant to 5 U.S.C. § 556 regarding applications, revocation, forfeitures and other matters designated for hearing.").

B. If The Commission Adopts The Two-Step Renewal Proposal Advanced In The *NPRM*, It May Dismiss The Pending Competing Applications Without Prejudice To The Ability Of A Competing Applicant To Re-Apply Should Renewal Be Denied.

Should the Commission ultimately decide to adopt a two-step renewal system for most Wireless Radio Services and to employ competitive bidding or other new mechanisms to award non-renewed licenses, the Commission has authority to dismiss the pending competing applications that were submitted by Petitioners and others under the prior regime, without prejudice to the ability of these applicants to re-apply in those cases where a license is not renewed.

The courts have recognized that when the Commission substantially modifies the licensing procedures applicable to a service, the Commission has discretion as to whether to apply its new rules to competing applications pending at the time.[33] Indeed, Petitioners concede, as they must, that "the Commission may modify its basis for selecting among competing applicants after the applications are filed."[34] That is hardly surprising – as the Commission noted in the *Order*, "[t]he filing of a mutually exclusive competing application does not in and of itself create in the applicant a vested right" to have its application processed under the rules in place when the application was filed.[35]

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[33] *See Maxcell Telecom Plus v. FCC*, 815 F.2d 1551 (D.C. Cir. 1997) (upholding the Commission's decision to extend lottery procedures to a previously pending comparative application); *DIRECTV*, 110 F.3d 816 (upholding the Commission's decision to use competitive bidding instead of a pro-rata division of channel reservations to each applicant); *Kessler*, 326 F.2d 686 (noting that the Commission decided to process pending applications under the extant rules).

[34] Petition at 9 (citation omitted).

[35] *NPRM and Order*, 25 FCC Rcd at 7034 n. 273 (citing *HITN v. FCC*, 865 F.2d at 1294-95; *Melcher v. FCC*, 134 F.3d 1143, 1164-65 (D.C. Cir. 1998); *Chadmoore Commc'ns v. FCC*, 113 F.3d 235, 240-41 (D.C. Cir. 1997)). A change to rules for processing license applications will generally create no retroactivity issue with respect to new or competing applications because a non-incumbent applicant has no vested "rights" nor would suffer any substantial impairment of any "past transaction" due to such a change. *See DIRECTV*, 110 F.3d at 825-26 (quoting *Landgraf v.*

(continued on next page)

That the Commission can modify its rules through a notice and comment rulemaking proceeding, and then dismiss pending competing applications that were filed under the prior rules, is well-established. For example, in *Chadmoore v. FCC*, the D.C. Circuit upheld the Commission's decision to dismiss the appellant's application for specialized mobile radio ("SMR") system extended implementation authority. Following the applicant's filing, the Commission modified its rules to provide for the use of competitive bidding in lieu of extended implementation authority. Consistent with its new approach, the Commission elected to dismiss pending requests for extended implementation authority because granting such requests "would conflict with [the FCC's] goal of uniformly implementing wide-area licensing."[36] The D.C. Circuit concluded that such an approach was clearly within the Commission's authority, and would be upheld so long as the Commission did not act in an arbitrary and capricious manner.[37]

In *Bachow Communications v. FCC*, upon which Petitioners heavily rely,[38] the D.C. Circuit made clear that "the Commission may make midstream rule adjustments, even though it disrupts expectations and alters the competitive balance among applicants."[39] In *Bachow*, the Commission proposed to abandoned comparative hearings in favor of using competitive bidding to select

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USI Film Prods., 511 U.S. 244, 280 (1994)); *Celtronix Telemetry v. FCC*, 272 F.3d 585, 589 (D.C. Cir. 2001). Thus, none of the reliance interests protected by the prohibition on retroactivity are implicated here, and the Commission properly may grant contested renewals conditioned on the outcome of a proceeding to determine whether to change the procedures that will apply to those renewals.

[36] *Chadmoore*, 113 F.3d at 238, *quoting* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order, Eight Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463, 1526 (1995).

[37] *See id.* at 240-241.

[38] *See* Petition at 9, 17.

[39] *Bachow Commc'ns v. FCC*, 237 F.3d 683, 687-88 (D.C. Cir. 2001).

licensees, and imposed an application freeze during the course of the pending rulemaking proceeding. The Commission ultimately adopted its proposal and dismissed mutually exclusive applications that had been filed under its old regime, finding that "processing mutually exclusive applications under an antiquated and burdensome comparative application system would diminish the efficiency gains expected from competitive bidding."[40] The D.C. Circuit upheld that approach, finding that the Commission "balanced the need to implement the new regulatory regime against the effect of upsetting the expectations of appellants and others," and noted that the Commission was reasonable in concluding that "processing mutually exclusive applications under an antiquated and burdensome comparative application system would diminish the efficiency gains expected from competitive bidding."[41]

Petitioners attempt to distinguish this precedent by claiming that while the Commission is free to dismiss all pending applications, it is precluded from dismissing only competing applications while retaining renewal applications. However, the case law cited by Petitioners is inapposite – it largely consists of broadcast cases decided prior Congress' adoption of Section 309(k) when the Commission was required, by its own rules, to conduct a comparative hearing whenever a renewal application was met with an acceptable competing application.[42] These cases do not address in any meaningful manner Petitioners' assertion that the Commission cannot adopt and then apply a two-step renewal processing. They merely stand for the proposition that where the rules call for one-

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[40] *See id.* at 686.

[41] *Id*.

[42] *See* Petition at 5. In other words, the "unbroken series of decisions by the D.C. Circuit ensuring the rights of renewal challengers to a comparative hearing" (Petition at 2) relied upon by Petitioners were all decided under one-step renewal systems – not one stands for the proposition that the Commission is precluded from adopting for all Wireless Radio Services a two-step renewal system similar to those in place for cellular and 700 MHz.

step processing and the Commission is not proposing to move to a two-step processing regime, competing applicants are entitled to have acceptable applications considered under the one-step regime.[43]

Not only have Petitioners failed to present any precedent analogous to the facts here, but they have completely ignored that the D.C. Circuit's decision in *HITN v. FCC* defeats their argument. There, the appellant sought review of an order that dismissed its Instructional Television Fixed Service ("ITFS") application on the grounds that the appellant was a "nonlocal applicant," while retaining a mutually exclusive application submitted by a "local applicant." Although the ITFS rules in effect at the time when the applications were submitted treated both "nonlocal applicants" and "local applicants" the same, the Commission subsequently modified its ITFS licensing process to create a period in which a "local applicant" would have an absolute priority over a competing "nonlocal applicant."[44] As a result, the Commission dismissed the appellant's nonlocal application, while ultimately granting the competing application of the "local applicant."

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[43] In the case of *Central Fla. Enterprises v. FCC*, for example, the issue before the D.C. Circuit was not whether the Commission was required to conduct a comparative hearing between a renewal applicant and a competing applicant, but whether the Commission properly applied the renewal expectancy in the manner mandated by Congress where the one-step renewal process mandated by the rules then in effect mandated a comparative hearing. 683 F.2d 503, 506-10 (D.C. Cir. 1982). Similarly, in *New South Media Corp. v. FCC*, 685 F.2d 708 (D.C. Cir. 1982), the D.C. Circuit merely ruled that where the one-step processing rule in effect at the time mandated comparative hearings, the Commission erred in suspending the filing of competing applications for a period that exceeded the renewal term. That is not a risk here. Petitioners' citation to *Community Broadcasting Co. v. FCC*, 274 F.2d 753 (D.C. Cir. 1960), is readily distinguishable from that here. In that case, the D.C. Circuit remanded the Commission's grant of special temporary authority to one of several pending applicants for a new VHF station for further exploration of several issues the Court deemed relevant. *See id.* at 762-63. As Petitioners have noted, WCS licensees that submitted timely renewals in 2007 are permitted under the Commission's rules to continue operating so long as their renewal applications are pending, and thus the entrenchment concerns raised by the *Community Broadcasting* court are not present here. *See* Petition at 7.

[44] *HITN v. FCC*, 865 F.2d at 1292-93.

The D.C. Circuit upheld the Commission's dismissal of one of the two competing applications, making clear that "[t]he filing of an application creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed."[45] Quoting from the Supreme Court's decision in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202, 205, 76 S.Ct. 763, 770, 771, 100 L.Ed. 1081 (1956), the D.C. Circuit noted:

> We do not read the hearing requirement [of Section 309(e)] . . . as withdrawing from the power of the Commission the rulemaking authority necessary for the orderly conduct of its business. . . . We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing.[46]

In short, the decision in *HITN v. FCC* establishes that so long as the Commission does not act in an arbitrary and capricious fashion, it may dismiss some, but not all, competing applications when a rule change adopted subsequent to the filing of those applications renders some of the applications inconsistent with the Commission's rules.[47] Or, put another way, should the Commission reasonably conclude at the end of the notice and comment phase of this proceeding that a two-step renewal process best services the public interest, nothing prevents it from granting

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[45] *Id.* at 1294-95.

[46] *Id.* at 1294.

[47] Petitioners argue at length that "there is no basis cited by the Commission or otherwise evident for preferring the incumbents over the challengers." Petition at 9. To the extent that Petitioners are suggesting that it would be arbitrary and capricious for the Commission to adopt the proposal advanced in the *NPRM*, that is a matter be addressed in the notice and comment phase of this proceeding. For present purposes, suffice it to say that, consistent with the ruling in *HITN v. FCC*, the Commission has ample authority to dismiss pending competing applications while retaining renewal applications. And, as discussed below, given that the Commission has authority to grant the pending renewal applications and dismiss the pending competing applications when it concludes the notice and comment proceeding, the decision in the *Order* temporarily to hold pending competing applications in abeyance and grant the contested renewals only conditioned by the outcome of this proceeding is a reasonable approach that falls well within the scope of the Commission's broad authority over licensing.

eligible renewal applications and dismissing competing applications without prejudice to the right of competing applicants to apply for those licenses that are not renewed.

C. There Is No Basis For Petitioners' Assertion That The Commission Is Precluded From Conditionally Granting Renewal Applications Subject To A Final Determination On Moving To A Two-Step Renewal System.

Having established that the Commission has ample authority to adopt a two-step renewal process and to dismiss currently pending competing applications, the final issue to be resolved is whether Petitioners are correct in their assertion that the interim processing procedures adopted by the *Order* "flagrantly contravene[]" *Ashbacker Radio Corporation v. FCC*.[48] They do not. Admittedly, *Ashbacker* might be relevant were the Commission to grant pending contested renewal applications during the pendency of the *NPRM* without conditioning them against the possibility that the current one-step comparative renewal process could be retained.[49] But the Commission is not proposing to do that, and instead has made clear that it will condition those renewals on the outcome of the *NPRM*'s evaluation of two-step processing. Thus, Petitioners have no grounds to complain.

Petitioners' reliance on *Ashbacker* in support of its claim is sorely misplaced. In that seminal case, Fetzer Broadcasting Company ("Fetzer") filed an application to construct a new broadcasting station. Shortly thereafter, Ashbacker Radio Co. ("Ashbacker") filed an application to change the operating frequency of its station, WKBZ. Because the change in operating frequency would "result in intolerable interference to both applicants," the Commission treated the

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[48] Petition at 4-9 (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)).

[49] Even then, for *Ashbacker* to be relevant, Petitioners' competing renewal applications would have to satisfy Section 27.321(b)'s test that comparative consideration be in the public interest. *See supra* note 15. As shown in Part II below, they cannot.

applications as mutually exclusive.[50] However, instead of comparing the applications before a grant of license, the Commission granted Fetzer's application without a hearing and scheduling a hearing for the Ashbacker application. The Supreme Court rejected this approach because it effectively precluded grant of the Ashbacker application.[51] As the Supreme Court reasoned, "if the grant of one effectively precludes the other, the statutory right to a hearing which Congress has accorded applicants before denial of their applications becomes an empty thing."[52]

What Petitioners ignore, however, is the *Ashbacker* Court's acknowledgement that the Fetzer application "was not *conditionally granted* pending consideration of petitioner's application."[53] Clearly, had the Commission conditionally granted the Fetzer application so that an interim grant would not preclude consideration of Ashbacker's application, the outcome of that case would have been different. The Commission has taken this distinction to heart in crafting its interim processing procedures, and carefully structured its process to protect the rights of Petitioners by conditioning any renewal grants on the outcome of this proceeding. The conditional grant of the contested WCS renewal applications does not preclude the subsequent evaluation and grant of Petitioners' competing applications, should the Commission ultimately decide to reject the

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[50] *Ashbacker*, 326 U.S. at 328 (internal quotations omitted).

[51] As the Court noted, WKBZ's notice of hearing stated that the application "'will not be granted by the Commission unless the issues listed above are determined in favor of the applicant on the basis of a record duly and properly made by means of a formal hearing.' One of the issues listed was the determination of 'the extent of any interference which would result from the simultaneous operation' of petitioner's proposed station and Fetzer's station. Since the Commission itself stated that simultaneous operation of the two stations would result in 'intolerable interference' to both, it is apparent that petitioner carriers a burden which cannot be met." *Id*. at 330-31.

[52] *Id*. at 330.

[53] *Id*. at 331 (emphasis added). Indeed, as the Court noted, a stay request during the pendency of the litigation was denied. *See id.*

proposals in the *NPRM* and retain the current one-step application process.[54] Thus, *Ashbacker* and the other precedent cited by Petitioners is readily distinguishable.[55]

II. THE COMMISSION HAS AUTHORITY TO RENEW ALL WCS LICENSES WHERE IT FINDS THAT DOING SO IS IN THE PUBLIC INTEREST.

Finally, Petitioners wrongly contend that the *Order* is flawed because it directs the Wireless Telecommunications Bureau to conditionally grant applications for renewal submitted by WCS licensees that had not demonstrated they were providing "substantial service" at the time they submitted their renewal applications.[56]

The Communications Act does not require that a licensee demonstrate "substantial service" (or, for that matter, any level of service) as a prerequisite to securing renewal of a license, and Petitioners fail to present any precedent to the contrary. Rather, the Communications Act requires that the Commission grant a renewal application (as with any application) if it finds that the "public

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[54] *NPRM and Order*, 25 FCC Rcd at 7034; *see also Kessler*, 326 F.3d at 688 ("The Commission will of course exercise its judgment as to whether mutual exclusivity does in fact exist in the case of any applicant claiming it, as to whether it wishes to waive the freeze on acceptance of applications from applicants claiming mutual exclusivity, and as to whether it wishes to proceed with a comparative hearing in due course, *or simply to postpone such hearing pending the conclusion of the rule making and the filing thereafter of new applications by appellants and others*.") (emphasis added).

[55] Of the cases cited by Petitioners, only *New South Media* involved a conditional license grant such as that proposed here. *See* Petition 5-6. In that case, because of procedural complexities associated with the infamous RKO General matter, the Commission conditionally granted broadcast station renewals and held competing applications in abeyance, notwithstanding that the applicable rules called for a one-step renewal process. The D.C. Circuit did not take issue with the Commission's conditional grant mechanism, but did remand because the matter dragged on for such a lengthy period that the conditionally-renewed licenses ran their full term and yet the competing applications had still not been considered. *New South Media*, 685 F.2d at 716-17. In other words, the problem in *New South Media* stemmed not from the making of a conditional grant of renewal applications, but from subsequent delays. That situation is unlikely to occur here – conditionally-renewed WCS licenses will not expire until 2017, and the Commission has committed to resolving this proceeding "in a prompt manner." *NPRM and Order*, 25 FCC Rcd at 7039.

[56] Petition at 2 ("the lack of substantial service by the incumbents must, under governing precedents, result in the non-renewal of their licenses.").

convenience, interest, or necessity will be served thereby."[57] Admittedly, with respect to services that lack the unique history of WCS, the Commission would be hard pressed to make such a finding absent some service by a renewal applicant. However, as the Commission recently recounted in its *Second Report and Order* and *Report and Order* in IB Docket No. 95-91 and WT Docket No. 07-293, the circumstances surrounding WCS have been anything but usual since licenses were first auctioned in 1997.[58]

Given the Commission's recent decision in these dockets, the long, tortured history need not be recounted at this juncture. Suffice it to say that, in light of the unusual circumstances that have rendered the WCS band challenging to employ for a viable service offering for more than fourteen years, the Commission can, consistent with the public interest mandate of the Communications Act, conclude that grant of WCS licensees' renewal applications, irrespective of a substantial service showing, would be in the public interest.

Originally, the Commission's rules required WCS licensees to make a showing of substantial service in their license areas by the end of their initial 10-year license term, which commenced on July 21, 1997.[59] Substantial service showings were submitted by that deadline for a number of WCS licenses.[60] However, in December 2006, the Wireless Telecommunications

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[57] 47 U.S.C. §§ 307(a), 309. *See also FCC v. Pottsville*, 309 U.S. at 138.

[58] *See* Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, *Report and Order and Second Report and Order*, FCC 10-82 (rel. May 20, 2010) ("*WCS Report and Order*").

[59] 47 C.F.R. § 27.14(a).

[60] *See, e.g.*, Applications of Horizon Wi-Com, LLC, *Memorandum Opinion and Order*, 24 FCC Rcd 359 (WTB 2009), superseded, *WCS Report and Order* at ¶ 218; Applications of Comcast WCS ME16, Inc. *et al.*, File Nos. 0003107373, 0003107370, 0003107440, 0003107385, 0003107379, 003107459, 0003107476, 0003107468; Stratos Offshore Services Co., File Nos. 0003074022, 0003074025, 0003074024, 0003074023.

Bureau found that the public interest would be served by granting a 3-year extension of the construction deadline for those WCS licensees that had requested additional time, and thus numerous renewal applications were submitted without any accompanying demonstration that substantial service was being provided.[61] As the Commission recently recounted:

> WCS licensees argued, among other things, that the uncertainty regarding the rules governing the operation of adjacent-band SDARS terrestrial repeaters had hindered WCS equipment development, network design, and facility deployment, and that an extension would allow them to deploy newly developed WiMAX technology in the 2.3 GHz band in the next few years.[62] WTB found that the possibility of WiMAX deployment warranted a 3-year extension of the initial 10-year construction requirement. Thus, the current deadline for meeting the construction requirements set forth in Section 27.14 of the Commission's rules was extended until July 2010 for WCS licensees.[63]

Under Petitioners' view of the law, the Bureau's decision to extend the substantial service deadline for WCS beyond the July 21, 2007 expiration of the license term was a trap for the unwary – according to Petitioners, where a licensee took advantage of the Bureau's extension and did not submit a substantial service showing by July 21, 2007, the Commission now cannot renew the

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[61] Consolidated Request of the WCS Coalition For Limited Waiver of Construction Deadline for 132 WCS Licenses, *Order*, 21 FCC Rcd 14134 (WTB 2006) ("*WCS Extension Order*").

[62] *Id*. at 14137.

[63] *WCS Report and Order* at ¶ 15. Although not relevant to Petitioners' argument that failure to demonstrate substantial service by July 21, 2007 sounded the death knell for WCS licenses, it is worth noting that WCS substantial service showings were submitted with respect to many licenses between July 21, 2007 and the Wireless Telecommunications Bureau's June 29, 2010 release of a *Public Notice* advising WCS licensees that, given the elimination of the old substantial service rule and the adoption of new performance requirements, further showings would not be permitted. Wireless Telecommunications Bureau Advised 2.3 GHz Wireless Communications Service Licensees That It Will Not Accept Substantial Service Performance Showings, *Public Notice*, DA 10-1193 (rel. June 29, 2010). Members of the WCS Coalition were prepared to submit substantial service showings with respect to many of their licenses prior to the July 21, 2010 deadline set in the *WCS Extension Order*, but refrained from doing so in light of the Bureau's directive.

license.[64] In so arguing, however, Petitioners ignore that the Commission has discretion to find that the public interest is served by renewal of a license even if service has not been provided.[65] Indeed, that is exactly what happened here – at the same time the Bureau was extending the July 21, 2007 deadline, it was also reminding WCS licensees that they nonetheless were required to submit renewal applications in timely fashion.[66] If the failure to submit a substantial service showing would preclude the Commission from granting a renewal, the Bureau would have advised licensees not to file for renewal absent a showing of substantial service. Instead, the Bureau's invitation suggested just the opposite – that the Commission was prepared to find, under the unique circumstances present with WCS, that the public interest would be served by renewal of even those licenses that were not being utilized to provide substantial service. Reversing course now as to

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[64] The Commission cannot have set such a trap. *See Time Warner Entm't Co., L.P. v. FCC*, 144 F.3d 75, 81-82 (D.C. Cir. 1998) ("We do not look sympathetically to the Commission playing 'gotcha' either."); *Gencom Inc. v. FCC*, 832 F.2d 171, 183 (D.C. Cir. 1987) (rejecting an argument that the Commission should reopen a contested site availability issue by stating that "[d]esignating misrepresentation issues against grantees who avail themselves of [the Commission's procedures permitting cellular grantees to modify their transmitter locations post-grant] would render them a trap for the unwary, and disserve the public interest"); Applications of Parkrell Broadcasting., Inc., Prescott, Ariz.; Southwest Broadcasting Co., Prescott, Ariz. for Construction Permits, *Memorandum Opinion and Order*, 59 F.C.C.2d 811, 814 (1976) (refusing to interpret the Commission's instructions so as to set a trap for the unwary).

[65] Should the Commission not adopt the proposals in the *NPRM* and instead consider the filings currently being held in abeyance pursuant to Paragraph 102, this same discretion will support dismissal of the competing WCS applications pursuant to Section 27.321(b) of the Rules on the ground that, given the unique history of WCS and the resulting impediments to deployment by the WCS incumbents, allowing competing applications to participate in comparative hearings with incumbent WCS licensees is not in the public interest.

[66] *See WCS Extension Order*, 21 FCC Rcd at 14141-42 ("while we are extending the deadline to meet the construction requirements, we remind WCS licensees that wish to renew their licenses that they must timely file a renewal application in compliance with the Commission's rules for its licenses.") (citation omitted).

what the public interest requires would be arbitrary and capricious in violation of the Administrative Procedure Act , and would violate the WCS licensees' constitutional due process rights.[67]

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For the reasons stated above, the Petition should be denied.

Respectfully submitted,

THE WCS COALITION

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August 23, 2010

[67] *See, e.g., Trinity Broad. of Fla. v. FCC*, 211 F.3d 618, 628-631 (D.C. Cir. 2000) (holding that due process bars the Commission from denying a renewal application without having provided the licensee with "fair notice" and "ascertainable certainty" of the Commission's interpretation of its rules).

CERTIFICATE OF SERVICE

I, Karla E. Huffstickler, hereby certify that the foregoing Opposition of the Wireless Communications Service Coalition was served this 23rd day of August, 2010 by emailing a copy thereof to Donald J. Evans at evans@fhhlaw.com.

/s/ Karla E. Huffstickler
Karla E. Huffstickler